

Defense Department Proposal to Establish the RESTRICTED Classification

Loss of U.S. technology to our adversaries is pervasive and uncontrolled. The unremitting flow of unclassified national security information, particularly technology and technical data with military application to hostile nations, is one of the more serious problems confronting this Administration. There is ample evidence that Soviet bloc nations actively acquire unclassified national security related publications. For example, Communist countries are some of the National Technical Information Service's (NTIS) best customers. Until their subscription was terminated in February 1980, the Soviet Union purchased each of the estimated 80,000 documents entering NTIS each year. The remaining Warsaw Pact countries and individuals acting on behalf of the Soviets still purchase from NTIS.

It has always been presumed that little could or should be done to limit such acquisitions, relying instead on the ability of the originators of such documents to properly secure sensitive information by using the existing security classification system. However, the existing three-level classification scheme does not provide adequate protection to a large body of sensitive national security information, particularly militarily critical technology and operational data developed solely for the use of our Armed Forces. Although such sensitive national security information fits the categories permitted to be classified, it does not rise to the level of the "identifiable damage" standard prescribed by the current Order, nor does it rise to the "damage" standard of the draft revision. It is this "damage" standard that is applied by originators in deciding whether to make their documents unclassified or to protect them by security classification. It is this "damage" standard that is applied by the courts in determining whether classified information may be withheld under the Freedom of Information Act (FOIA). Unless the proposed fourth level of classification is adopted sensitive national security information that does not reach the "damage" standard but, if disclosed, could be disadvantageous to U.S. national interests, will continue to be uncontrollably disseminated.

**No Referral - On file OSD release instructions apply.**

nated through government distribution systems. Further, such information will continue to be specifically vulnerable to release upon request under the FOIA.

Some may argue that a fourth level of classification would dilute the efficacy of the security classification system resulting in a loss of its credibility. Quite the contrary, the fourth classification level strengthens the system by authorizing the protection of valuable national security information that is now jeopardized because "nothing can be done about it" under the current Order. It recognizes a serious information control problem and provides a credible solution. The "damage" standard remains undiluted for the higher levels of classification; the fourth classification level introduces a realistic "loss" standard for the protection of sensitive national security information that is now unprotected; and the overall classification protection of information in the interest of national security is strengthened. Expansion of the current classification scheme will not be viewed as a radical departure but rather as a reasonable, necessary, and responsible extension of access control over certain information based on legitimate national security concerns. It is an immediate and proper solution to preclude further loss to our adversaries of such information.

This Department is not alone in its concern about the flow of sensitive but unclassified national security information to our adversaries. Various members of Congress, industry and the public media are concerned as well. No one argues that useful technical and military information is freely available, however, opponents of increased information control through security classification argue that's the price that's paid for living in an open society. Alternatives put forth to accomplish such increased controls, such as amending the FOIA or existing statutes governing export control are specious. Since 1790 when President Washington asserted the right to limit dissemination to the public under Article II, Section 2 of the Constitution, the practical and theoretical foundation for the President's authority to withhold certain information in the interest of national security was established. There is a direct line from this Constitutional foundation

to our present classification system. For the past thirty years, the Executive Branch has been committed to policies that recognize that citizens have a general right to be informed about the processes of departments and agencies and that the Executive Branch also has a specific right to withhold certain information concerning the defense and foreign relations of the United States. This perception has been reflected by the last seven Presidents in the Executive orders they issued or continued for purposes of authorizing the assignment of security classification to certain information to protect national security. The authority to protect national security information is clearly the President's and not a prerogative of the Congress.

Other alternatives, such as increased emphasis on dissemination control systems by individual agencies or through additional Executive orders, do not have the force or immediate effect of security classification. Nor would such controls, under existing legislative policy, be sufficient to effectively stem the flow of sensitive national security information to hostile nations.

The proposed fourth level of classification would require a minimal amount of education and training to implement, and would not result in a significant rise in additional safeguarding costs. Information so marked does not invite a degree of harm that would justify the safeguards concerning access clearance, transmittal, use and destruction authorized for information classified Confidential and higher. Therefore, the minimal safeguards imposed on such information will not be costly, and will stem effectively the current unrestricted flow of sensitive national security information.

It is my understanding that other Executive Branch agencies are reluctantly distributing and releasing information that is disadvantageous to U.S. national security interests. It was for this reason that we included in our proposed definition of Restricted loss of a "diplomatic" or "intelligence" advantage. However, if State and CIA do not share the same degree of concern over loss of such information as we do over military technology and operational information then we would offer the following more narrow definition for Restricted information as an alternate proposal.

"Restricted" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause the loss to the United States of a technological or military advantage and which requires protection in the interest of national security.

This alternately defined fourth classification level would apply to a wide range of technical and training data produced by this Department which does not meet the current criteria for classification. This information, invaluable as a reflection of the state-of-the-art of military technology and the extent to which it has tactical and strategic military application is highly sought and easily obtained by our adversaries. Several highly classified studies can be provided that demonstrate the degree to which our adversaries are using such information to their immediate and long-range benefit. However, the benefit of the alternative proposal principally accrues to this Department since it is the primary and largest user of technology related and military operational information.

The current uncontrolled dissemination of sensitive but unclassified national security information, especially when taken in the aggregate, is demonstrably disadvantageous to U.S. national security interests. The loss of such information and the advantages gained by our adversaries requires that steps be taken now to provide legal and positive control of it. We continue to urge approval of our initially proposed fourth level of classification as an effective and inexpensive means to restrict access to sensitive national security information that is now unprotected. While we would accept the proposed alternate, more narrow definition that ameliorates some of this Department's concerns, we continue to believe that the problem of inadequate protection of sensitive national security information extends throughout the Executive Branch. There are no other acceptable alternatives if we are to discharge effectively our considerable responsibility for the protection of information in the interest of national security.

Changes to the revised order necessary to establish the RESTRICTED classification are as follows:

Change Section 1-101 to read:

1-101. National security information...shall be classified at one of the following [three] four levels:

Add Section 1-101(d) to read:

1-101(d). "Restricted" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause the loss to the United States of a technological, diplomatic, intelligence, cryptologic, or military advantage and which requires protection in the interest of national security.

Change Section 1-302 to read:

1-302. Information...shall be classified when...its unauthorized disclosure reasonably could be expected to cause the loss of an advantage to the United States or cause damage to the national security.

Change Section 1-501(d) to read:

(d) one of the [three] four classification designations....

Change Section 4-101 to read:

4-101. A person is eligible for access to Restricted information only when such access is essential to the accomplishment of authorized and lawful Government purposes. A person is eligible for access to [classified] Top Secret, Secret, or Confidential information only after a [formal] favorable determination of trustworthiness....